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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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9 THOMAS JACKSON, an individual; and
10 CAROL JACKSON, an individual.
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12 Plaintiffs,
13 v.
14 UNITED ARTISTS THEATRE CIRCUIT,
15 INC., etc.
16 Defendant.

2:10-cv-00050-LDG-GWF

ORDER

16 Plaintiffs Carol Jackson and her husband Thomas Jackson allege that Mrs. Jackson slipped
17 on a substance believed to be popcorn oil while in a movie auditorium of defendant's theater on
18 February 29, 2008, and sustained injuries to her neck, shoulder and back. Before the court at this
19 time are defendant's motion for summary judgment (#61, opposition #69, reply #74), plaintiffs'
20 motion for summary judgment (#62, opposition #68, reply #73); plaintiffs' motion for partial
21 summary judgment (#67, opposition #71, reply #76), plaintiffs' motion in limine to exclude
22 testimony and expert report of Richard M. Harding (#59, response #63, reply #70), and defendant's
23 motion in limine to limit plaintiffs' expert Neil Opfer (#60, response #64, reply #72).

24 The dispositive motions contest issues in common. Defendant's motion for summary
25 judgment generally asserts that plaintiffs cannot prove at trial that a dangerous condition existed in
26 the theater, or that defendant created the condition or had actual or constructive knowledge of the

1 condition prior to Mrs. Jackson's alleged fall, or that, even if a foreign substance was on the floor,
2 plaintiffs cannot prove that defendant had actual or constructive notice of the unsafe condition. In
3 support, defendant points to plaintiffs' and theater employees' statements that they did not see any
4 substance on the floor where Mrs. Jackson slipped, and that defendant's cleaning protocols
5 required inspection and cleaning of the auditoriums, including seating rows, by theater employees
6 between movie showings, and more thorough cleaning by a janitorial service after closing.
7 Plaintiffs assert that the evidence and law lead to a different conclusion.

8 Summary judgment is appropriate only if the pleadings, the discovery and disclosure
9 materials on file, and any affidavits show that there is no genuine issue as to any material fact and
10 that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56c. In determining
11 whether summary judgment is appropriate, the court views the facts in the light most favorable to
12 the non-moving party and draws reasonable inferences in favor of that party. Scheuring v. Traylor
13 Bros., Inc., 476 F.3d 781, 784 (9th Cir. 2007) (citing Anderson v. Liberty Lobby, Inc., 477 U.S.
14 242, 255 (1986)). To defeat summary judgment, the opposing parties must make a showing
15 sufficient to establish a genuine dispute of a material fact regarding the existence of the essential
16 elements of [the] case that [they] must prove at trial." Galen v. County of Los Angeles, 477 F.3d
17 652, 658 (9th Cir. 2007) (citation omitted). On a motion for summary judgment, it is not the
18 province of a district court judge to weigh the evidence. Anderson, 477 U.S. at 255 ("Credibility
19 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the
20 facts are jury functions, not those of a judge, whether [she or] he is ruling on a motion for summary
21 judgment or for a directed verdict.").

22 While the procedural record in this case is not a pretty one, plaintiffs have raised genuine
23 issues of triable fact regarding whether Mrs. Jackson slipped on a foreign substance on the floor
24 that should have been discovered by defendant. First, during a post-incident inspection of the
25 auditorium, several of defendant's employees identified some substance on the floor in the seating
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1 row where Mrs. Jackson slipped. Plaintiffs posit that one of those employees, Archie Gatbonton in
2 fact cleaned up the substance that he described as butter, and then prepared a post-it note writing
3 “Slip and Fall (Butter),” with an arrow, positioned the note on the floor, and took a photo of the
4 area. Defendant vigorously contests the admissibility of the Gatbonton evidence, noting that his
5 statement was taken in an “unnoticed” deposition, and is hearsay. Regardless of whether the
6 acquisition of the Gatbonton statement is sanctionable for violating discovery protocol, the court
7 finds that it at least presents an account that Gatbonton can testify about at trial with first-hand
8 knowledge. A possible hearsay issue would only ripen if he did not testify. Moreover, statements
9 by an employee or former employee may be admissible as an admission by a party opponent not to
10 be treated as hearsay. Movie 1 & 2 v. United Artists Communications, Inc., 909 F.2d 1245, 1249-
11 50 (9th Cir. 1990). As to the photo, it is not a statement, and the court finds that whether it
12 accurately depicts the location of the accident, in view of the varying interpretations of how the
13 plaintiffs’ party was seated, remains an issue of fact for trial.

14 In addition, a report prepared by an insurance carrier investigator cites employee Scott
15 Rowe as having found “a little butter slop” on the floor. Later, Rowe denied having made that
16 statement to the investigator, and having found a foreign substance on the floor. Rowe’s credibility
17 in that regard is an issue for the jury.

18 The court also finds a jury question in whether defendant should have known of the
19 condition of the floor. While the owner of property is not an insurer of the safety of a person on
20 the premises, a business owes its patrons a duty to keep the premises in a reasonably safe
21 condition. Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). Whether
22 a business owner is under constructive notice of a hazardous condition on the premises, is normally
23 a question of fact. Id., 849 P.2d at 323. Here, an inference can be made drawn that, based on the
24 location of the other attendees at the movie, the foreign substance was left by a previous audience.

1 An issue of fact therefore exists as to whether defendant exercised reasonable care in discovering
2 and removing the substance.

3 As to the motions in limine, judges have broad discretion when ruling on motions in limine,
4 see, e.g., Jenkins v. Chrysler Motors Corp., 316 F.3d 663, 664 (7th Cir. 2002), and a district court's
5 ruling on a motion in limine is subject to change, particularly in light of developing trial
6 considerations, see Luce v. United States, 469 U.S. 38, 41-42 (1984). After reviewing the points
7 and authorities, the court will deny (1) plaintiffs' motion in limine to exclude testimony and expert
8 report of Richard M. Harding based on the grounds contained in defendant's opposition, and (2)
9 defendant's motion in limine to limit plaintiffs' expert Neil Opfer based on the grounds contained
10 in plaintiffs' opposition. The parties will be allowed to further examine a witness' qualifications
11 during voir dire, and renew their motions to exclude the witness at that time.

12 THE COURT HEREBY ORDERS that defendant's motion for summary judgment (#61),
13 plaintiffs' motion for summary judgment (#62), and plaintiffs' motion for partial summary
14 judgment (#67) are DENIED.

15 THE COURT FURTHER ORDERS that plaintiffs' motion in limine to exclude testimony
16 and expert report of Richard M. Harding (#59), and defendant's motion in limine to limit
17 plaintiffs' expert Neil Opfer (#60) are DENIED.

18 THE COURT FURTHER ORDERS that plaintiffs' motion for hearing on pending matters
19 (#96) is DENIED as moot.

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21 Dated this 29 day of March, 2012.

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Lloyd D. George
United States District Judge